No. 03-358

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
I.	The interference with Presidential discretion will not "resolve itself" and has not been ratified by Congress	2
II.	The court of appeals erroneously required the preparation of an EIS concerning the President's discretionary decision	4
III.	The court of appeals' clean air analysis was incorrect	9

TABLE OF AUTHORITIES

Cases:

Aberdeen & Rockfish R.R. v. *SCRAP*, 442 U.S. 289 (1975)	7
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)	3
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000)	1
Environment Def. Fund, Inc. v. *EPA*, 82 F.3d 451, amended, 92 F.3d 1209 (D.C. Cir. 1996)	9
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989)	7
United States v. *Franco-Lopez*, 312 F.3d 984 (9th Cir. 2002)	8

Statutes and regulations:

Clean Air Act, 42 U.S.C. 7506(c)(1)	1, 9
Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, § 350, 115 Stat. 864	3, 4, 5
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	1
49 U.S.C. 13902(a)(1)	5, 10

Regulations—Continued: Page

40 C.F.R.:
Section 93.152 ..... 9, 10
Section 1500.1(c) 7
Section 1508.8(b) 6
Section 1508.12 6

Miscellaneous:

148 Cong. Rec. S7429-S7430 (daily ed. July 26, 2002) 3
Determining Conformity of General Federal Actions to State or Federal Implementation Plans, 58 Fed. Reg. 63,221 (1993) 10
S. Rep. No. 224, 107th Cong., 2d Sess. (2002) 3, 4

In the Supreme Court of the United States

No. 03-358

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This is anything but the "routine" case (Br. in Opp. 9) respondents make it out to be. The court of appeals incorrectly construed and applied the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the conformity-review requirement of the Clean Air Act (CAA), 42 U.S.C. 7506(c)(1), to override Presidential discretion that those statutes preserve. The Ninth Circuit's unwarranted extension of NEPA and the CAA to require environmental review of a foreign affairs decision that is within the President's sole discretion "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000); see Pet. 24-25. Furthermore, looking no further than this particular case, the decision below is delaying substantially the United States' compliance with the arbitration decision of February 2001,

thereby preventing the resolution of a trade dispute that affects millions of border crossings each year and that, Mexico asserts, is causing billions of dollars of economic injury. See Pet. 24-26.

I. THE INTERFERENCE WITH PRESIDENTIAL DISCRETION WILL NOT "RESOLVE ITSELF" AND HAS NOT BEEN RATIFIED BY CONGRESS

A. Respondents' first argument against review by this Court is that, because the Federal Motor Carrier Safety Administration (FMCSA) has begun the environmental review required by the court of appeals despite the pendency of the instant petition, the case "will soon resolve itself." Br. in Opp. 10. That is plainly wrong. As the petition explains (at 15 n.7), FMCSA has entered into a contract for preparation of the Environmental Impact Statement (EIS) and CAA analysis contemplated by the court of appeals, if that analysis is required. There is no genuine possibility that FMCSA would complete the necessary work before the end of this Court's current Term. See Br. in Opp. 10. Moreover, the agency's CAA review might thereafter require additional consideration of air emissions in certain areas. And because the court of appeals' decision provides respondents future opportunities to attempt to prevent opening of the border by again claiming that FMCSA undertook inadequate environmental review, another judicial challenge to FMCSA's safety rules would be virtually certain. Unless the Court intervenes, resolution of this dispute is unlikely until 2005 or 2006 at the earliest—and that assumes the Ninth Circuit would reject any subsequent challenge.

Trying to downplay the significance of that delay, respondents assert (Br. in Opp. 17) that the Ninth Circuit's decision does not "interfere with any commitments of this country." Undeniably, however, the decision below is preventing the United States from implementing the February 2001 arbi-

tration decision that found a NAFTA violation. See Pet. 5, 26.

B. Respondents similarly are incorrect when they contend (Br. in Opp. 11-14, 20-21) that, in February 2003, Congress ratified the court of appeals' decision by re-enacting Section 350, the appropriations rider that governs FMCSA's expenditure of funds on registering new operations of Mexican motor carriers. See Pet. 7 (discussing rider). Section 350 addressed *safety* issues associated with the registration of the Mexican trucks that would be permitted to enter the United States under the President's decision to open the border. Section 350 did not amend the environmental statutes on which the court of appeals relied and it makes no mention of environmental issues. As respondents concede, such legislative inaction "has generally been rejected as an interpretive aid." Br. in Opp. 13 (citing *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994)).

Respondents' ratification argument seems to be that, by reenacting the appropriations rider a few weeks after the Ninth Circuit panel issued its decision in this case, Congress endorsed the practical result of delaying implementation of the President's border-opening decision. See Br. in Opp. 12-14. There was no such congressional endorsement. The court of appeals entered its judgment on January 16, 2003. Pet. App. 2a. The rider was in the Fiscal Year 2003 appropriations bill when it was reported by the Senate Committee on Appropriations in July 2002—six months *before* the Ninth Circuit rendered its decision in this case. See 148 Cong. Rec. S7429-S7430 (daily ed. July 26, 2002); S. Rep. No. 224, 107th Cong., 2d Sess. 85 (2002).

Moreover, the Senate Committee's reasons for including the rider were unrelated to the instant litigation. The Senate Report focused entirely on safety concerns. When the Report was issued, FMCSA already had published its

final safety rules, and the Senate Report addressed one task that remained to be performed under Section 350: the Secretary of Transportation's consideration of findings by the agency's Inspector General that opening the border does not pose an unacceptable safety risk. See S. Rep. No. 224, *supra*, at 84-85. Notably, respondents do not suggest that legislators considered the decision below in connection with the appropriations process, see Br. in Opp. 12-13, and there is no evidence that they did.

In any event, Congress's unexplained reenactment of Section 350, which makes no mention of environmental concerns, says nothing about the question before this Court: whether the court of appeals correctly applied the environmental laws to a foreign affairs determination of the President.

II. THE COURT OF APPEALS ERRONEOUSLY REQUIRED THE PREPARATION OF AN EIS CONCERNING THE PRESIDENT'S DISCRETIONARY DECISION

A. The petition explains (at 14-19) that the President's border-opening decision is exempt from NEPA's EIS requirement, and that the exemption of Presidential action cannot properly be overridden by treating the border opening as an effect of FMCSA's safety rules. Respondents argue (at 14-15) that this issue was not preserved below. Again, respondents are mistaken.

In the court of appeals, the government argued precisely that respondents "misappl[ied] [Council on Environmental Quality (CEQ)] guidelines as to the proper scope of NEPA analysis" in urging the application of the EIS requirement to "effects that may result from a Presidential decision to modify the trade moratorium." Gov't C.A. Br. 50-51; see *id.* at 53 ("[T]he President's discretionary action on the moratorium * * * cannot be said to be 'caused by' [FMCSA's] rulemaking."), 54 (environmental impacts alleged by respon-

dents "are * * * impacts of the moratorium modification alone"). The government made the same argument in the stay proceedings below, see Gov't Response in Opp. to Pet.'s Mot. for an Emergency Stay Under Circuit Rule 27-3, at 8 ("[T]he *President's* actions relating to international trade and the trade moratorium * * * are beyond this Court's review."); *id.* at 17 (citing potential harm to "diplomatic relations and the President's conduct of foreign affairs"), and in its petition for rehearing and rehearing en banc (at 1) ("At issue is the ability of the President to conduct foreign affairs and trade policy free of interference from the courts."). Although the court of appeals disagreed with the government's position, it clearly understood that the government had raised the issue whether the President's decision to open the border is exempt from NEPA review. See Pet. App. 26a, 30a-31a, 47a, 51a.

B. Respondents next suggest (Br. in Opp. 17) that the President's ability to exercise his lawful discretion is not genuinely at issue in this case because Congress has the power to regulate foreign commerce. As the petition explains (at 4, 25), Congress has vested the President with sole authority to lift the moratorium on cross-border operations. The President's discretionary decision to take that step in response to the February 2001 ruling of the international arbitration panel is an exercise of the *combined* authority of both Political Branches.

C. FMCSA had no authority, either before or after the enactment of Section 350, to override the President's determination to lift the moratorium or to impose its own bar to the entry of Mexican trucks and buses. Because FMCSA operates under a statutory mandate to grant registration to all domestic and foreign carriers that are "willing and able to comply with" applicable safety and financial responsibility requirements, 49 U.S.C. 13902(a)(1), FMCSA's task was confined to issuing appropriate rules to govern the safe opera-

tions of trucks and buses that would be allowed to enter the United States when *the President* lifted the moratorium. Because FMCSA has no authority to prohibit the entry of those vehicles into the United States, it had no obligation to prepare an EIS to examine the environmental consequences of either allowing entry or maintaining a general prohibition.

Respondents further contend (Br. in Opp. 18-23) that FMCSA was required to prepare an EIS addressing the President's border-opening decision because, under the appropriations rider, "Mexico-domiciled trucks cannot travel throughout the United States unless the challenged rules are implemented," *id.* at 19. Respondents echo the court of appeals' view (Pet. App. 30a-31a) that, under the CEQ regulations implementing NEPA, any environmental effects of opening the border are "caused by" FMCSA's safety rules, see 40 C.F.R. 1508.8(b), because "Congress has prohibited FMCSA from processing applications from Mexico-domiciled trucks until the rules are in place," Br. in Opp. 19.

The Ninth Circuit's "but for" approach is inconsistent with NEPA and the CEQ regulations, for the reasons stated in the petition (at 14-18). First, that approach would in practical effect subject to NEPA analysis a decision of the President that is expressly exempt from NEPA under 40 C.F.R. 1508.12. Second, it would require FMCSA, which is vested under its authorizing statute strictly with safety responsibilities (see Pet. 6), to treat its 2002 safety rules as the "cause" of a border-opening action that the President made in 2001, and that FMCSA has no power to change. Third, in compelling FMCSA to suspend its safety rules while it prepares an EIS addressing a NEPA-exempt determination that the President made several years ago in light of foreign-affairs considerations—and thereby delaying this Nation's compliance with NAFTA and the 2001 arbitral decision—the "but for" approach does nothing to advance NEPA's purpose

of "help[ing] public officials make decisions." 40 C.F.R. 1500.1(c).

The decisions respondents cite as being "no different" from the use of a "but for" approach (Br. in Opp. 20) are entirely unhelpful to them. In *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989), the Forest Service prepared an EIS to assist its own discretionary decision whether to grant a permit for the construction of a ski resort on federal land. See *id.* at 336-338. Similarly, in *Aberdeen & Rockfish Railroad* v. *SCRAP*, 422 U.S. 289 (1975), the subject of the EIS prepared by the Interstate Commerce Commission was the environmental impact of the Commission's *own* decision concerning rates for rail transport. See *id.* at 297-306. *SCRAP* in fact confirms that NEPA review is not required if "no purpose [would be] served" by such review. *Id.* at 325. That is precisely the situation here.

Respondents also assert (Br. in Opp. 21) that "[i]t is not the President's decision that is subject to review" under the court of appeals' decision, but rather FMCSA's rules. See *id.* at 2 ("This case does not involve the application of the environmental laws to a presidential decision."). The court of appeals disagreed. It declared that any "distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry" is "illusory," Pet. App. 47a, and it concluded that "the President's rescission of the moratorium was [a] 'reasonably foreseeable' [effect]" of FMCSA's regulations that should have been studied by the agency, *id.* at 31a. Under the decision below, the action that FMCSA must examine in an EIS is *the President's* decision to lift the moratorium on new cross-border operations.

D. Finally, respondents argue (Br. in Opp. 25) that FMCSA's NEPA review was deficient because FMCSA might have been able to tailor its safety regulations to "alleviate environmental effects" of the President's decision.

As pointed out in the certiorari petition (at 21-22 n.10), however, none of the respondents argued in FMCSA's rulemaking proceedings that FMCSA should consider alternative rules, let alone adopt especially stringent *safety* requirements so as to prevent Mexican trucks from meeting those requirements and thereby lessen any *environmental* consequences of the President's border opening. There is, moreover, a substantial question whether that would be a proper use of FMCSA's rulemaking authority under a statutory scheme that requires the agency to grant registration to all carriers that are willing and able to meet safety and financial responsibility requirements.

Respondents likewise did not raise this issue in their petition for judicial review, but rather adverted to it only in passing in a reply brief. See Pet. 21 & n.10. Respondents assert that the inclusion of the issue in a reply brief means that it was timely presented under Ninth Circuit precedent and, therefore, provides potential grounds for affirmance by this Court. Br. in Opp. 25 n.5. Respondents are mistaken. Ninth Circuit cases do not say that parties may raise new issues in their reply brief by calling them "rebuttal" (*ibid.*), but rather that the court may consider an appellant's arguments concerning issues *the appellee* injected into the case. See *United States* v. *Franco-Lopez*, 312 F.3d 984, 993 n.6 (9th Cir. 2002). Respondents do not identify anything in the government's appellate brief that raised, on their behalf, the alternative claim of agency error they seek to advance.

Because respondents' agency-discretion argument was not properly raised before FMCSA or in the court of appeals, it cannot support affirmance. See Pet. 21. Furthermore, even if this Court agreed with respondents' alternative ground and it became the basis for a remand order, the government would receive substantial relief from this Court because FMCSA's task on remand then would not include studying the environmental effects of the President's

border-opening decision, but instead would be limited to examining the environmental consequences of the relatively narrow range of safety-related options open to FMCSA in light of the President's decision to open the border. See *ibid.*

III. THE COURT OF APPEALS' CLEAN AIR ANALYSIS WAS INCORRECT

Respondents say little about the petition's showing (at 22-24) that the court of appeals also fundamentally misinterpreted the CAA's conformity-review requirement. Respondents do not attempt to argue that the President is a "department, agency, or instrumentality of the Federal Government," 42 U.S.C. 7506(c)(1), whose activities are potentially subject to the conformity-review obligation. See Br. in Opp. 26 n.8. Instead, tracking their NEPA argument, respondents contend (*id.* at 27) that FMCSA had to conduct a conformity review because "[FMCSA's] rules will result in Mexico-domiciled trucks traveling beyond the border commercial zones and emitting pollution."

The controlling regulations of the Environmental Protection Agency (EPA), as construed by the District of Columbia Circuit in upholding those regulations, see *Environmental Defense Fund, Inc.* v. *EPA*, 82 F.3d 451, 463-465 (per curiam), amended, 92 F.3d 1209 (D.C. Cir. 1996), compel the opposite conclusion. See Pet. 23-24. First, FMCSA cannot "practicably control" the additional emissions that supposedly will result from opening the border, as would be required for those emissions to be "indirect emissions" of the FMCSA rules (and thus subject to the conformity-review requirement). See Pet. 22-24; 40 C.F.R. 93.152 (definition of indirect emissions). FMCSA has no control over the President's decision to open the border to Mexican motor

carriers and no programmatic responsibility for emissions by those carriers. See Pet. 24.*

Second, FMCSA will not "maintain control over" emissions that result from opening the border, as EPA's "indirect emissions" definition also requires. 40 C.F.R. 93.152. FMCSA's role in this context is the essentially ministerial one of granting registration to any Mexican motor carrier that is "willing and able to comply with" applicable safety and financial-responsibility requirements. 49 U.S.C. 13902(a)(1). FMCSA's authorizing statute does not make it responsible for limiting carrier registration to accomplish environmental objectives, and FMCSA likewise is not responsible for opening or closing the border. For that additional reason, the conformity-review requirement does not apply to FMCSA's safety rules.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2003

---

* The "practicabl[e] control" requirement is separate from, and in addition to, the "continuing program responsibility" requirement that respondents say (Br. in Opp. 27) is satisfied in this case. See *Determining Conformity of General Federal Actions to State or Federal Implementation Plans*, 58 Fed. Reg. 63,221 (1993) ("indirect emissions" are less-proximate emissions "that would be brought about by agency action, *and* that the agency can practicably control, *and* that are subject to a continuing program responsibility of th[e] agency") (emphasis added). Respondents, moreover, are incorrect when they argue (Br. in Opp. 27) that FMCSA has continuing program responsibility over the emissions of Mexican trucks and buses because those emissions are the "result" of FMCSA's rules. As explained in Point II.C, above, under the correct analysis the additional emissions that respondents contend will occur would result, not from FMCSA's safety rules, but from the President's decision to open the border to new Mexican motor carriers.